Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	
	)	
Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates	)	MM Docket No. 90-4
	)	
Request by TV14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market	)	MM Docket No. 92-295 RM-8016

PETITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION FOR RECONSIDERATION

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein

ITS ATTORNEYS
1724 Massachusetts Ave., NW
Washington, DC 20036
(202) 775-3664

May 3, 1993

TABLE OF CONTENTS

SUMMARY

The must carry and retransmission consent requirements adopted by the Commission compound the burdens faced by operators, programmers and their subscribers in adjusting to the new signal carriage regime established by Congress in the 1992 Cable Act. In particular, the rules impose on operators a fast-paced and disjointed schedule. Cable systems are required to begin carrying must carry stations and rearrange their channel line-ups before they are even informed of a broadcaster's election between must carry and retransmission consent and its preferred channel position. The implementation schedule will therefore cause twice as much disruption and subscriber confusion, as multiple changes in carriage lineups are forced to be made over a five month period.

In addition, the rules implementing the must carry provisions of the Act should be modified to eliminate the requirement that a cable system must honor a UHF station's request for on-channel carriage even if that channel number would otherwise be outside a system's basic tier. This on-channel carriage requirement will cause significant technical problems for operators, and will interfere with their ability to comply with the tier buy-through provisions of the Cable Act. The must carry rules also unduly constrain operators' ability not to carry duplicating stations, and to provide customized service to commercial subscribers.

With respect to the retransmission consent requirements, the Commission has adopted rules that interfere with the marketplace

negotiations that Congress intended to foster. For example, in determining that certain provisions of Section 614 apply to retransmission consent signals, and in allowing stations electing retransmission consent to black out other network affiliates, the Commission has unfairly and arbitrarily skewed those negotiations in favor of broadcasters. Finally, the Commission should modify its rules to allow systems to continue to receive superstations by microwave, and should elminate its ban on exclusive retransmission consent agreements between stations and systems.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	
	)	
Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates	)	MM Docket No. 90-4
	)	
Request by TV14, Inc. to Amend Section 76.51 ~~of~~ the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market	)	MM Docket No. 92-295 RM-8016

PETITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION FOR RECONSIDERATION

The National Cable Television Association ("NCTA"), pursuant to Section 1.429 of the Commission's rules, hereby petitions for reconsideration of the rules adopted in the above-captioned proceeding. NCTA participated in the rulemaking proceeding leading to adoption of the rules.

The Cable Television Consumer Protection and Competition Act of 1992 establishes a detailed statutory scheme governing carriage of broadcast signals by cable systems. The Commission's rules implementing these requirements, as well as the schedule it

carriage regime. Several rules appear to go well beyond the intent of the statute to impose additional, unwarranted requirements on cable operators that unduly constrain their programming choices and business operations, and impose significant unnecessary costs on operators, programmers, and their subscribers. Accordingly, for the reasons stated below, NCTA requests that the Commission reconsider certain aspects of its new signal carriage rules.[1/]

ARGUMENT

I. THE REPORT AND ORDER'S IMPLEMENTATION SCHEDULE WILL RESULT IN UNDUE BURDENS ON OPERATORS, PROGRAMMERS, AND VIEWERS.

The rules provide for a fast-paced implementation schedule.

- Beginning on April 2, 1993 -- the date of the rules' publication in the Federal Register -- operators must provide 30 days' notice before deleting or repositioning any broadcast stations. Also beginning on that date, petitions to modify markets to expand a broadcaster's area of must carry protection may be filed.

- On May 3, 1993, operators must give notice (1) to all non-commercial educational ("NCE") stations of the location of their principal headend; and (2) to all local

---

1/ Given that many of these burdens take effect on June 2, 1993, and that other issues relating to retransmission consent will affect negotiations between stations and operators while reconsideration is pending, we have also filed a request for stay of the rules. Regardless of whether a stay is granted, since all of the rules adopted will go into effect on October 6, 1993, we request that the Commission expedite consideration of this petition to give operators and stations an adequate period for transition to the new rules.

stations that may not be entitled to must-carry status because (a) carriage would increase the cable operator's copyright liability or (b) their signal does not meet the signal strength requirements.

- The rules also establish an interim regime lasting from June 2, when the obligation to provide mandatory carriage to commercial stations begins, until October 6, 1993, when retransmission consent and channel positioning provisions take effect.

- While operators must add local commercial stations on June 2, those stations are not required to make their election between must carry or retransmission consent, or even identify their preferred channel position, until 15 days later -- on June 17.

This rapid and disjointed implementation schedule leads to several anomalies and undue hardships on operators and programmers. Rather than changing carriage line-ups and channel positions once to come into compliance with the new rules, operators will be required to go through this process at least twice, if not three times, in a five-month period. These unnecessary hardships can be avoided if the implementation schedule is modified to allow a more rational and orderly transition to the new signal carriage regime.

A. Commercial Must-Carry Obligations Should Not Become Effective Before the Retransmission Consent Regime Becomes Effective.

Section 614(f) provides that "[w]ithin 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section" (emphasis added), and,

indeed, the Commission has done so. Section 614(f) is utterly silent, however, on when those rules must become effective.

In our comments filed in this proceeding, we urged the Commission to adopt a single date -- October 6, 1993 -- on which both must carry and retransmission consent obligations would become effective. The Commission rejected this approach. While purportedly "seek[ing] to avoid unnecessary cost and inconvenience that may result from changes in channel line-ups," the Report and Order cites only to its "belie[f]" that "congressional intent precludes us from simply delaying implementation of must-carry until October 6, 1993."[2/]

In its haste to impose mandatory carriage rules on

meantime will have been forced by June 2 to decide to drop existing cable program services -- services which an operator may later find it would have capacity to carry if retransmission consent negotiations fail.

Moreover, by May 3, operators must provide notices to those stations that may not be eligible for must carry rights because their signal strength is inadequate or because their carriage would result in increased copyright liability. Broadcasters notified by May 3 that they may be ineligible for must carry status may gain such eligibility if they agree to deliver a good quality signal or indemnify an operator for increased copyright liability. But the Commission refused to impose a deadline for broadcasters to respond to operators after receiving this notice as to whether they are willing to take these steps.[3/] Operators with fewer must carry stations than their "cap" therefore cannot know with any certainty on June 2 whether they will be required to add even more broadcast stations, move existing services, or delete existing program services.

Furthermore, the Commission allowed broadcasters to file petitions beginning on April 2 to expand their ADI and obtain expanded cable carriage. But it did not set a deadline by which all such petitions must be filed. This again places a cloud over cable systems' ability to know, with any degree of certainty, what their must carry obligations will be on June 2.

3/ Report and Order at para. 102.

In combination, under the implementation schedule in place, operators may be forced to rearrange their carriage lineups three times in a five-month period: (1) on June 2; (2) at some interim point when a station with inadequate signal strength or distant for copyright purposes later asserts must carry rights, or a station outside the ADI obtains an expanded market determination; and (3) by October 6, when retransmission consent becomes effective.

B. The FCC Should Reconsider the Decision to Cause Commercial Must-Carry Obligations to Become Effective Before Must-Carry Stations Are Required to Designate the Channel Position on Which They Wish to Be Carried.

A further difficulty arises from the implementation of the channel positioning requirements. On June 2, 1993, when cable operators must begin carrying must-carry-eligible commercial stations, cable operators will not know whether a given station will elect must-carry status, and, if so, on which channel the station will wish to be carried after October 6. The rules give commercial stations choosing must carry status four different channel options, and NCE stations three different options, making it difficult for a cable operator correctly to divine a station's intent. If it turns out on June 17 that a cable operator guessed wrong on June 2 about a station's preferred channel position,

that cable operator will have to move the station on October 6.[4/]

* * * *

The Report and Order's implementation schedule will cause twice as much disruption and confusion as necessary. Operators require an adjustment period in order to understand the full extent of their signal carriage obligations, to purchase and install equipment and make changes in channel lineups, and to provide notice to franchising authorities and their subscribers of these changes. For all these reasons, the Commission should modify its implementation schedule on reconsideration so that carriage and channel positioning obligations take effect simultaneously with retransmission consent requirements on October 6, 1993 -- and certainly not before the election between must carry and retransmission consent on June 17.

4/ The problem is exacerbated by the Commission's refusal to promulgate channel positioning priority rules. Report and Order, para. 90. It is inevitable that there will be instances in which two or more stations will assert a claim to the same channel. But because must carry takes effect before channel positioning elections must be made and conflicting claims resolved, an operator may be required to add a channel on June 2, only to find that it must be moved on October 6.

II. THE MUST CARRY RULES SHOULD BE MODIFIED.

A. UHF Stations Should Not Have On-Channel Carriage Rights Where The Channel Requested is Outside an Operator's Basic Tier.

In its Notice of Proposed Rulemaking in this proceeding, the Commission explained its

> assumption that Congress intended that stations be entitled to their over-the-air channel position only when that channel is encompassed by the basic service tier on the system. Thus, for example, a system with a basic tier encompassing channels 2 through 12 would not need to provide a local station broadcasting on channel 50 with on-channel carriage.[5/]

Nevertheless, the Report and Order adopts precisely the opposite view. Citing only its belief that "Congress emphasized that the must-carry and channel positioning provisions are meant to protect our system of television allocations and promote competition in the local markets",[6/] the Commission takes a 180-degree turn to require on-channel carriage of UHF stations, regardless of the number of channels in a system's basic service tier. This "belief" hardly provides support for the unexplained reversal of an entirely reasonable interpretation of the Act.

The Report and Order now provides that an operator must grant on-channel carriage absent a "compelling technical reason

---

5/ NPRM at para. 33.

6/ Report and Order at para. 91.

for not being able to accommodate that request", and it sets a high threshold for making that showing:

> We do not believe that inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes are sufficient reasons for denying the channel positioning request of a must-carry signal. Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station.[7/]

The Commission apparently reached this conclusion based on the assumption that "most systems are able to configure their service to fulfill this requirement." Id. But this unsupported assumption ignores the fact that reconfiguring many systems to meet this requirement is something that can be accomplished, if at all, only through significant expenditures of time and money. On-channel carriage of UHF stations also conflicts with the congressional goal of enabling basic-only subscribers to "buy-through" to services offered on a per-program or per-channel basis.

As the attached declaration of Wendell Bailey, NCTA's Vice President of Science and Technology, explains, providing on-channel carriage to a station outside a system's basic tier line-up entails significant operational and technical problems. Operators must isolate each broadcast signal by inserting traps

---

7/ Report and Order at para. 91.

on either side of the broadcast channel. As the number of traps increase (generally above four), systems experience significant technical problems, making the system unable to comply with the cable technical standards.[8/]

Moreover, even if trapping to provide UHF on-channel carriage were possible without causing serious degradation to the cable system's performance, the costs of installing traps will be significant. Since traps are used as security devices in virtually all cable systems, providing on-channel carriage for stations in basic-only subscriber homes may entail a separate service visit from a technician to each home in order to change out existing filters and install new ones.

UHF on-channel requirements can cause problems even in a system with addressability. While a system (at significant additional costs) could scramble all channels surrounding the UHF channel in order to enable basic-only subscribers access to all must carry stations, it would be required to force expanded basic subscribers to obtain descrambling converter boxes in order to view tiered services that previously were protected by a filter

---

8/ As the Commission recognized in its Tier Buy-Through decision, "traps can have a degrading effect on signal quality, limiting their use." Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-262 (rel. April, 1993) at para. 9, n.13.

trap.[9/]

Aside from the costs and technical difficulties associated with UHF on-channel carriage, it also poses a conflict with the congressional objective of enabling a basic-only subscriber to purchase pay-per-view programming or pay channels without being required to purchase intermediate tiers. In its Tier Buy-Through decision, the Commission required operators to comply with the buy-through prohibition if they have the capability to do so "through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided."[10/] But as the attached affidavit describes, forcing operators to provide UHF stations with on-channel carriage rights makes it difficult, if not impossible, for systems to comply with this provision.

In short, requiring on-channel carriage for UHF stations poses significant problems for cable systems. It imposes significant costs at a time when rates have been frozen, and can technologically degrade cable system operations. The Notice had it right -- on-channel carriage of UHF stations outside a basic

---

9/ This result would also appear to conflict with the congressional objective of increasing compatibility between cable systems and consumer electronics equipment. See id. at paras. 19, 20 and n.21.

10/ Id. at para. 14.

tier should not be required. The Commission's unexplained departure from its entirely reasonable interpretation should be reconsidered.

B. The Commission's Definition of "Substantial Duplication" Should Be Reconsidered.

Congress intended to provide operators relief from being forced to devote channel capacity to stations that carry duplicative programming instead of programming that provides diversity to viewers.[11/] In addition to affording operators the discretion not to carry duplicating network affiliates, the Act provides that "[a] cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system ...." Section 614 (b)(5) (emphasis added). The Commission's rule implementing this provision, however, fails to provide operators this relief. Instead, it establishes a virtually insurmountable test for finding a station to be "substantially duplicating".

Under Section 76.56(b), a local commercial television station is substantially duplicating if it

> regularly simultaneously broadcasts the identical programming as another station for more than 50 percent of the broadcast week. For purposes of this definition, only identical episodes of a television series are considered duplicative, and

---

11/ See, e.g., H. Rep. No. 92-628, 102d Cong., 2d Sess. 94 (explaining that "this provision is intended to preserve the cable operator's discretion while ensuring access by the public to diverse local signals.")

> commercial inserts are excluded from the comparison.

It will be rare indeed to find two qualified local television stations that meet this test, unless one station is a satellite of another.[12/]

This is particularly problematic because the Commission has defined duplication more broadly in connection with its syndicated exclusivity and network non-duplication rules. For example, a syndicated program may be duplicative if it is part of a series for which a station has exclusive rights, even if the particular episodes shown by another station are different from those shown by the station with the exclusive rights. A program also may be duplicative regardless of whether it is being shown simultaneously on a distant station and the station asserting exclusivity -- or whether it is even being shown at all by the station asserting exclusivity.

The failure to conform these definitions of duplication will lead to a decrease in diverse cable offerings, contrary to the intent of the Act. And the Commission's decision not to protect must carry stations against blackouts under its exclusivity

---

12/ See generally Report and Order at n.88 (discussing must carry status of parent and satellite stations).

rules[13/] compounds these problems. For example, as the Commission acknowledges, the area in which a station may assert must carry rights (the ADI) is not coextensive with the zone of exclusivity protection for a station (generally 35 miles). In ADIs encompassing large geographic areas, then, operators may be required to carry stations that are subject to blackouts from stations that are within 35 miles of the cable community.[14/] The net result will be that operators will be required to carry stations with substantially "duplicative" programming under the exclusivity definition and then to delete that programming. Thus, a signal filled with blackout holes will have to be carried in lieu of a 24-hour-a-day cable service, so that less programming -- and less diverse programming -- is available to subscribers.

definition of "substantial duplication" in the statute. Instead, it left the Commission discretion to do so. Forcing carriage of a station that can be blacked out pursuant to syndex and network non-duplication rules for a substantial portion of its broadcast day hardly affords operators the discretion not to carry stations that substantially duplicate each other, and cannot be what Congress intended.

Accordingly, the Commission should reconsider its definition of substantial duplication, so that what is considered duplicative for must carry purposes is the same as what is considered duplicative under the syndex and network non-duplication rules.

C. The Commission Should Modify its Interpretation of the Must Carry Rules to Allow Operators to Provide Commercial Establishments with the Local Signals They Desire.

Beginning on June 2, operators will be required under the Commission's rules to provide every local must carry station to every subscriber of a cable system -- even if those subscribers specifically request not to receive them. This is because the Commission interprets the requirement that all local must carry signals must be provided to every cable subscriber to apply to cable's provision of signals to commercial subscribers, such as hotels and hospitals.[16/] The Report and Order suggests that

subscribers: "commercial subscribers, of course, may exclude the must carry signals in cases where converters or other equipment are needed to receive such signals, the subscriber elects not to obtain such equipment, and the cable operator does not provide the connections for all television receivers in the commercial establishment." Report and Order at n.99. The Commission should clarify that an operator may wire individual rooms, and need not require its customer to provide connections for all television sets in its establishment in order to be exempt from the rule.

Operators should not be required to give sophisticated buyers of video services programming that they do not want -- particularly since these establishments have access to services provided by competing multichannel video distributors that are not subject to any must carry obligations at all.

III. THE RETRANSMISSION CONSENT RULES SHOULD BE MODIFIED ON RECONSIDERATION.

As the Senate Report makes clear, Congress intended through retransmission consent "to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing negotiations."[17/] Several aspects of the Commission's ruling on retransmission consent, however, unfairly and arbitrarily skew those negotiations away from the marketplace that Congress envisioned and toward the broadcasters' side of the

---

17/ Senate Report at 36.

bargaining table. Other aspects interfere with the ability of systems and stations to reach agreements that are in their mutual best interest, and the interests of subscribers. They should be reconsidered.

A. Allowing Stations Electing Retransmission Consent Status to Be Entitled to Rights Under Section 614 Is Directly at Odds with Section 325(b)(4).

Although the Commission in its Notice of Proposed Rulemaking tentatively concluded that a station opting for retransmission consent status would lose all rights that it might otherwise have had under Section 614,[18/] it abruptly reversed itself in the Report and Order. Instead, it concluded that the provisions of Sections 614(b)(3)(A) (carriage of the entire signal and specified ancillary material), 614 (b)(4)(A) (technical quality), and 614 (b)(9) (deletion notice) by their terms are applicable to all local commercial stations carried by a cable system, not just those carried pursuant to the must carry obligations of Section 614.[19/] And Section 614(b)(3)(B), which requires carriage of a station's entire program schedule, is interpreted by the Commission to apply to any broadcast station carried on the system. Thus, the Report and Order puts a thumb on the scale on the side of broadcasters in retransmission consent negotiations

---

18/ Notice of Proposed Rulemaking at para. 56.

19/ Report and Order at paras. 170, 171.

by dictating the outcome with respect to content to be carried, signal quality, and deletion notification.

The Commission claims that provisions of Section 614 requiring deletion notices, specifying signal quality and requiring carriage of ancillary material apply to retransmission consent stations because the statutory language refers to "local commercial television stations."[20/] But the Act explicitly carves out an exception for stations opting for retransmission consent. Thus, Section 325(b)(4) provides that:

> If an originating television station elects under

consent signals, there is absolutely no support for this requirement applying to every television station carried on the system. Section 614 deals only with carriage of local television stations. The Commission does not address how it derives authority from this section to adopt the sweeping prohibition on partial carriage of distant stations contained in its rule.[21/]

Nor does such a rule make any sense from a policy standpoint. The Commission has already concluded that the language of Section 325 requires operators to obtain consent to retransmit the signal of any distant non-superstation broadcast station. If an operator were to obtain that consent from the station and to pay the required copyright fee for carrying the station's programming in whole or in part, there is no reason why the operator should be required either to carry every single program or to carry none at all.

21/ 47 C.F.R. Section 76.62(a) ("cable operators shall carry the entirety of the program schedule of any television station carried unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under Section 76.67 or subpart F of Part 76 of the rules.") (emphasis added).

The Commission attempts to find support for this prohibition against partial carriage in the language of Section 325(b) itself. But nothing in that Section compels this result. It provides that multichannel video programming distributors

For example, a local network affiliate may preempt occasional network programming or may not clear network programming on a regular basis. Under these circumstances, an operator may wish to import a more distant affiliate in order to ensure that its subscribers have access to a full network program lineup. There is no public interest justification for denying cable subscribers access to this programming -- nor anything in the Act that indicates that this is a result Congress desired.

In sum, in finding that systems must carry the entire program schedule of any station (local or distant) carried pursuant to retransmission consent, and in determining that virtually all the requirements of Section 614 (except for channel positioning) apply to retransmission consent stations, the Commission has adopted an interpretation that is utterly contrary to the statute. It should be reconsidered.

B. Stations Not Electing Must Carry Status Should Not Be Allowed To Assert Blackout Rights.

The Commission recognizes that "the overriding intent of the 1992 Cable Act was to increase -- not reduce -- availability of broadcast signals to the public."[22/] Nevertheless, it has adopted policies in the retransmission consent area that are directly contrary to that policy. Most notably, the Commission's retransmission consent requirements -- coupled with its continued application of network non-duplication rights to

---

22/ Report and Order, para. 147.